pelled to render service without such a stipulation is not regarded as sufficient protection to the patrons from a practical standpoint. Moreover, the law imposes special duties upon the public-service company because of its relation to the public, and so far as these duties are essential to the service they are insisted upon more strictly than general common-law duties.[7]

The importance of the relation between the parties is further illustrated by cases where the company stipulates for exemption from liability for negligence, not as a public-service company, but simply as a member of society. There are two classes of cases. In one, the company does something not only beyond obligation but which increases the risk of loss through negligence, such as leasing part of a railroad's right of way, or operating a private siding. Here the courts are practically unanimous in allowing the exemption.[8] In the other class the company simply owes no duty as a public-service company. For instance, where a railroad contracts with an adjoining property owner for exemption from liability for negligence, although the railroad operates its line as a common carrier, it owes no duties as such to the adjoining property owner. The parties contract as ordinary members of society. There is no danger of overreaching. Furthermore, even conceding that such contracts have a tendency to induce carelessness, as a practical matter the interest of the patrons and of the adjoining property owner usually involve separate considerations. Thus, while the danger from sparks is real to the property owner, it is inappreciable to the patron. Consequently, such contracts are also upheld.[9] A recent case holding the contrary is practically without support on the authorities. *Stoneboro & Chautauqua Lake Ice Co.* v. *Lake Shore & Michigan Southern Ry. Co.*, 86 Atl. 87 (Pa.).

THE DIVISION OF POWERS IN GOVERNMENT. — In 1787 the distinct division of the government into legislative, executive, and judicial powers was regarded as the keystone of the Constitution. It was thought that if liberty could be preserved it would be by these carefully gradu-

[7] The protection accorded to customers of public-service companies and servants is somewhat analogous to the law as to infancy. The respect for relational duties has an analogy in the policy against contracts affecting the duties of parents, or in derogation of the marriage relation. Andrews *v.* Salt, L. R. 8 Ch. 622; Hussey *v.* Whiting, 145 Ind. 580; 44 N. E. 639; Irvin *v.* Irvin, 169 Pa. St. 529, 32 Atl. 445.

[8] Leasing part of a right of way: Griswold *v.* Ill. Central Ry. Co., 90 Ia. 265, 57 N. W. 843; Stephens *v.* So. Pac. R. Co., 109 Cal. 86, 41 Pac. 783; Hartford Fire Ins. Co. *v.* C. M. & St. P. Ry. Co., 175 U. S. 91, 20 Sup. Ct. 33. Operating a private siding: Porter *v.* N. Y., N. H. & H. R. Co., 205 Mass. 590, 91 N. E. 875; Mo., K. & T., Ry. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159; Mayfield *v.* So. Ry., 85 S. C. 165, 67 S. E. 132. For other cases where the company does something beyond its obligation as a public-service company, which involves an increased risk, see 2 WYMAN, PUBLIC-SERVICE CORPORATIONS, §§ 1015, 1018.

[9] Richmond *v.* N. Y., N. H. & H. R. Co., 26 R. I. 225, 58 Atl. 767. In this case a spur had been constructed, but a contract covering negligence in operating the main line was upheld. In Thomason *v.* Kansas City So. Ry. Co., 122 La. 995, 48 So. 432, the court assumed the validity of such a contract, but construed the contract in question as not including negligence on the main line.

ated checks and balances. Federalist [1] and Republican [2] alike worshiped at the shrine of Montesquieu.[3] A fear that any attempt to mend might mean only the disintegration of a not too firmly established central government, a veneration for authority, or the very applicability of this plan of government to the problems and conditions of those days carried it through the next two generations without a serious doubt as to its adequacy.[4] Not until the stress of readjustment after the Civil War had begun to subside did anyone seriously question the finality of our plan of government.[5] And the plan does not now lack for able and unprejudiced defenders.[6] The majority of critics to-day, however, seems to agree that some modification of the strict theory is desirable.[7]

The more serious possibilities of the plan, however, have already been mitigated by the judiciary in developing and applying the Constitution to the increasingly complex problems of a centralizing government. In theory the three powers [8] of government were made mutually exclusive, either expressly as in most of the state constitutions,[9] or by implication as in the federal Constitution.[10] But in practice the absolute separation was recognized as impossible [11] and it was left for the

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[1] See Washington's Farewell Address. HAMILTON, FEDERALIST, No. 78. WORKS OF JOHN ADAMS, p. 186.

[2] JEFFERSON, NOTES ON VIRGINIA, 195. MADISON, FEDERALIST, No. 47.

[3] MONTESQUIEU, L'ESPRIT DES LOIS, *livre* XI, *c.* VI, "De la Constitution d'Angleterre." Some critics still insist on the extreme form of Montesquieu's division. See SCHOULER, IDEALS OF THE REPUBLIC, chap. 9; WYMAN, ADMINISTRATIVE LAW, § 17. Although Aristotle speaks of three departments of government, his later language shows that he had little of the modern conceptions of their lines of division. ARISTOTLE, POLITICS, book VI, c. xiv.

[4] See STORY, COMMENTARIES ON THE CONSTITUTION, § 518 *et seq.* (1833); GODKIN, THE CONSTITUTION AND ITS DEFECTS, 99 NORTH AMERICAN REV. 117 (1864).

[5] See WOODROW WILSON, CONGRESSIONAL GOVERNMENT, 5 (1885).

[6] See A. LAWRENCE LOWELL, CONSTITUTION AND MINISTERIAL RESPONSIBILITY, 57 ATLANTIC MONTHLY 180 (1886); DAVIS, RELATIONS OF THE THREE DEPARTMENTS OF THE UNITED STATES, 3 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE, 467 (1885).

[7] See GOODNOW, COMPARATIVE ADMINISTRATIVE LAW, Book I, Chap. III; FORD, 49 Scribner's Magazine, 54; W. L. Wilson, PROCEEDINGS OF NEW YORK STATE BAR ASSOCIATION, 1897, p. 22. *Contra*, LOWELL, ESSAYS ON GOVERNMENT, 58.

It is interesting to note that the two keenest English critics of our government, Bagehot and Bryce, have strongly disapproved of the American division of powers. BAGEHOT, ENGLISH CONSTITUTION, 296; BRYCE, AMERICAN COMMONWEALTH, Ch. XXVI. The two latest Presidents of the United States have both advocated a closer coördination of the executive and legislative departments. W. H. TAFT, CONGRESSIONAL RECORD, Jan. 3, 1913; WOODROW WILSON, 57 ATLANTIC MONTHLY, 542. The Constitution of the Confederacy gave the cabinet officers seats in the legislature. See 3 JOHNS HOPKINS UNIVERSITY STUDIES, 481.

[8] To-day probably even the advocates of the old division of powers would admit that it is more accurate to speak of the three manifestations of the one sovereign power. See BONDY, THE SEPARATION OF GOVERNMENTAL POWERS, 5 COL. UNIV. STUDIES IN HISTORY AND ECONOMICS, 16.

[9] VERMONT CONSTITUTION, Ch. II, § 6; ILLINOIS CONSTITUTION, Art. III.

[10] *In re* Hayburn, 2 Dall. (U. S.) 409. See also People *ex rel.* McDonald *v.* Keeler, 99 N. Y. 463, 480. It is to be observed that the federal Constitution contains no limitation whatever on the distribution of powers by the state governments unless the due process clause shall be considered applicable. See Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 552, 28 Sup. Ct. Rep. 178, 181. But see 27 POL. SCI. Q. 216.

[11] See Brown *v.* Turner, 70 N. C. 93, 102; France *v.* State, 57 Oh. St. 1, 17, 47 N. E. 1041, 1043.

courts to limit the merger of powers at some point undefined by the Constitution.

An easy but indefensible solution was to hold that the prohibition only extended to the placing of all the power of one department in the hands of another department.[12] In general, however, the courts have chosen a different path. They have allowed administrative boards to make reasonable regulations for water companies,[13] gas companies,[14] public health,[15] and conduct of schools,[16] and to fix fees within defined limits,[17] acts which on any proper analysis would seem to be legislative in character. But they have refused to permit an executive board to create an office,[18] fix a standard insurance policy,[19] define a crime [20] or a penalty,[21] or fix a license tax.[22] A late Vermont case sanctioned a blending of certain legislative and judicial powers in an administrative railroad commission.[23] *Sabre* v. *Rutland R. Co.*, 85 Atl. 693 (Vt.). On the other hand the Illinois court refused to allow a civil service commission to appoint a probation officer, insisting that the freedom of the judicial department depends on its appointing its own officers. *Witter* v. *County Commissioners of Cook County*, 45 Chic. Leg. N. 194 (Ill., Sup. Ct., Dec. 1912). This decision is perhaps wise but seems inconsistent with decisions which have sustained statutes authorizing a judge to appoint purely ministerial officers such as police commissioners,[24] election commissioners,[25] park commissioners,[26] railroad directors,[27] and tax-collectors.[28] Occasionally the courts have been called upon to prevent the usurpation of judicial functions by the legislature.[29] This practice, rather common in colonial days, was later only checked by a considerable struggle.[30]

[12] But see People *ex rel.* Longenecker *v.* Nelson, 133 Ill. 565, 601, 27 N. E. 217, 226.

[13] Knoxville *v.* Knoxville Water Co., 107 Tenn. 647.

[14] Trustees of the Village of Saratoga Springs *v.* Saratoga Gas, Electric Light, and Power Co., 191 N. Y. 123, 83 N. E. 693.

[15] Pierce *v.* Doolittle, 130 Ia. 333, 106 N. W. 751.

[16] State *ex rel.* School District No. 1 *v.* Andrae, 216 Mo. 617, 116 S. W. 561.

[17] Merchants' Exchange of St. Louis *v.* Knott, 212 Mo. 616, 111 S. W. 565. All of these cases also involve the distinct question of the delegation of legislative power.

[18] State *v.* Butler, 105 Me. 91, 73 Atl. 560.

[19] Dowling *v.* Lancashire Insurance Co., 92 Wis. 63, 65 N. W. 738.

[20] United States *v.* Mathews, 146 Fed. 306.

[21] Board of Harbor Commissioners *v.* Excelsior Redwood Co., 88 Cal. 491, 26 Pac. 375.

[22] State *ex rel.* Wyatt *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627.

[23] *Accord*, Southern Ry. Co. *v.* Railroad Commission of Indiana, 42 Ind. App. 90, 83 N. E. 721; Minneapolis, St. P., & S. S. M. Ry. Co. *v.* Railroad Commission of Wisconsin, 136 Wis. 146, 116 N. W. 905. These were cases of a commission fixing rates after a proper hearing.

[24] Fox *v.* McDonald, 101 Ala. 51, 13 So. 416.

[25] Russell *v.* Cooley, 69 Ga. 215. *Contra*, Case of Supervisors of Election, 114 Mass. 247; and see note to Hayburn's Case, 2 Dall. (U. S.) 409.

[26] People *ex rel.* Dunham *v.* Morgan, 90 Ill. 558.

[27] Walker *v.* Cincinnati, 21 Oh. St. 14.

[28] Hoke *v.* Field, 10 Bush (Ky.) 144. It seems specious to distinguish as the court apparently did here between a delegation of power to an officer and to a person holding an office.

[29] Ashuelot R. Co. *v.* Elliot, 58 N. H. 451 (foreclosure of mortgage); Edwards *v.* Pope, 4 Ill. 465 (giving widow dower); Campbell *v.* Mississippi Union Bank, 6 How. (Miss.) 625 (dissolving corporation).

[30] For a collection of numerous cases of the provincial legislature in Massachusetts acting as a court see 15 HARV. L. REV. 208. For an account of the Rhode Island controversy, over the legislature's right to reverse a judicial decree for specific performance see 22 MONTHLY LAW REP. 65.

The courts seem to have performed consistently their clear though often difficult duty of maintaining the spirit if not the form of our government by checking the more flagrant and unnecessary instances of confusion of powers while allowing the mixture of powers where, as is frequently the case in the administrative department,[31] it is peculiarly necessary. It seems probable that in the future a growing conception of what is peculiarly necessary will prevent the constitutional requirement of a division of powers from proving a serious check on the gradual development of administrative commissions, and closer coöperation between the departments. But any more radical changes in government must be sought by amendment. The American system of government was designed chiefly to secure a maximum of individual freedom. It is for the student of political science to accommodate that system to an increasingly paternal government which naturally inclines toward the efficiency [32] of an administrative or commission government.

EFFECT OF AN OPTIONAL CONTRACT TO BUY LAND. — There are three types of contracts by which an option to buy land may be given to a prospective purchaser. The vendor in return for a consideration paid may promise to convey the land on tender of the price within a specified time.[1] This is a unilateral agreement analogous to a life-insurance contract. Secondly, the vendor may make an offer to sell for a given price and a unilateral contract to hold this offer open for a specified time.[2] The unilateral contract will be specifically enforced since damages at law are inadequate, and, as the purchaser has paid his consideration, no objection can be made on the ground of mutuality.[3] When the option is exercised a bilateral contract for the sale of the land arises. Thirdly, the vendor may make an irrevocable offer to sell for a definite price within a fixed time. In some states an offer under seal has this effect.[4] Here as in the second case, a bilateral contract arises upon the acceptance of the offer. In each case, however, the purchaser has a right to specific performance of the contract and cannot be refused the land on performing or

[31] See decisions on this point collected in 66 CENT. L. J. 24.

[32] It is sometimes said that the division of powers was intended to enhance the efficiency of government. See 20 YALE L. J. 88. This seems to contradict the entire purpose of the framers of the Constitution, which was not to avoid friction but through the friction of the departments to save the people from tyranny. See citation *supra*, notes 1, 2. Certainly in practice the system of checks has not contributed to efficiency. See BRYCE, AMERICAN COMMONWEALTH, Chap. xxvi.

[1] *Cf.* Borel *v.* Mead, 3 N. M. 84, 2 Pac. 222. See an article by Professor Langdell in 18 HARV. L. REV. 1, 11. It is to be observed that in this class of cases there is no obligation on the purchaser to perform even after he has given the vendor notice of his intention to do so. Hence courts are inclined to find that the parties made a contract of the second or third type. See 18 HARV. L. REV. 457.

[2] Ross *v.* Parks, 93 Ala. 153, 8 So. 368; Brown *v.* Slee, 103 U. S. 828; Boyden *v.* Hill, 198 Mass. 477, 85 N. E. 413.

[3] Guy *v.* Warren, 175 Ill. 328, 51 N. E. 581. Even when the vendor has simply given a first refusal and is not bound to sell to the holder of the refusal equity will enjoin him from selling to anyone else. Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1901] 2 Ch. 37.

[4] O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602; McMillan *v.* Ames, 33 Minn. 257, 22 N. W. 612.